IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 11, 2004

JAMES D. ALDER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Franklin County
No. 12715 Buddy D. Perry, Judge

No. M2003-02766-CCA-R3-PC - Filed October 13, 2004

This is an appeal from the denial of post-conviction relief. The Defendant, James D. Alder, was convicted by jury verdict of attempted second degree murder, aggravated assault, and reckless endangerment. This Court upheld the Defendant's convictions on direct appeal. The Defendant subsequently filed a Petition for Post-Conviction Relief. The trial court denied this petition and the Defendant now appeals to this Court arguing the single issue of ineffective assistance of trial counsel. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Mickey Hall, Winchester, Tennessee, for the appellant, James D. Alder.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steve Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On the morning of August 28, 1998, the Defendant entered the Favorite Market in Dunlap, Tennessee, threatened to kill his wife Casey Alder (now Casey Davidson) and then shot her at close range in the chest with a 20-gauge shotgun. Also in the market at the time and witnesses to the shooting were two of the victim's co-workers, one of whom the Defendant directly threatened with his weapon. The victim suffered extensive internal injuries, underwent multiple surgeries and spent two months in a coma; however, she survived the shooting. The Defendant was indicted for one count of attempted first degree murder, two counts of aggravated assault and two counts of reckless endangerment. A Franklin County jury convicted the Defendant of the lesser-included offense of

attempted second degree murder and one count each of aggravated assault and reckless endangerment. The trial court sentenced the Defendant to concurrent terms of twenty years for the attempted second degree murder, fifteen years for aggravated assault and four years for reckless endangerment. These sentences were ordered to run consecutively to a twenty year sentence the Defendant had previously received.

This Court affirmed the Defendant's convictions on direct appeal. See State v. Alder, 71 S.W.3d 299 (Tenn. Crim. App. 2001). The Defendant subsequently filed a pro se petition for post-conviction relief alleging nine separate grounds for relief. Defendant was appointed counsel and filed an amended Petition for Post-Conviction Relief alleging only ineffective assistance of counsel at trial. A post-conviction evidentiary hearing was held on September 24, 2003.[1]

At his post-conviction hearing the Defendant testified as to his version of the shooting and raised questions as to whether his trial attorney, Mr. Jeff Harmon, had adequately prepared for and made sound tactical decisions throughout his trial. The Defendant testified that he entered the market--concededly with a shotgun--merely to talk with his wife. He wanted her to leave with him but she refused. The Defendant said the two began to argue, the victim grabbed the gun and "the gun went off." The Defendant testified that Mr. Harmon convinced him not to testify on his own behalf. The Defendant also alleged that his trial attorney met with him only a few times and never for very long, and refused to present evidence of his mental health problems. The Defendant, through his new counsel, also claimed Mr. Harmon's representation at trial was deficient with respect to his cross-examination of several witnesses, and further deficient due to his failure to object to an alleged improper jury instruction.

The State argued at the post-conviction hearing that Mr. Harmon provided effective counsel as evidenced by the fact that the Defendant was convicted of a much less serious crime than his indicted offense of attempted first degree murder. The State further asserted that the Defendant's fate may well have been worse if evidence of his mental history had been introduced, or if he had testified on his own behalf. The State noted that Mr. Harmon had been practicing law since 1986, exclusively criminal law since 1992, had been counsel in over 100 trials and was death penalty certified. Furthermore, the State admitted into evidence a letter written by the Defendant to Mr. Harmon less than two months after the trial in which the Defendant stated:

> [Y]ou are a good lawyer. . . . I won't [sic] you to know that I am not mad at you cause [sic] you did a good job so thank you and take care and keep on doing the good work you are doing and if I ever need a lawyer you would be the one I would won't [sic] to take my case.

At the conclusion of the hearing the trial court issued a ruling from the bench denying the Defendant post-conviction relief. The Defendant timely filed a Notice of Appeal with this Court.

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[1] This hearing combined two post-conviction petitions, one relating to an earlier case involving the Defendant's conviction of aggravated kidnaping, and this case pertaining to the attempted murder of the Defendant's wife.

ANALYSIS

I. Standard of Review

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

II. Ineffective Assistance of Counsel

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer, and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

The Defendant alleges that his trial attorney was constitutionally deficient in five specific areas related to his jury trial which led to actual prejudice: (1) inadequate preparation, (2) persuasion of the Defendant not to testify, (3) ineffective cross-examination of witnesses, (4) failure to present evidence of the Defendant's history of mental illness, and (5) failure to object to flawed jury instructions.

A. Inadequate preparation

The Defendant asserted at the post-conviction hearing that his trial attorney met with him "one or two times at the Winchester jail and a couple of times at the Sequatchie County jail." He further claimed that the meetings were short and focused primarily on possible plea bargains as opposed to developing a defense. However, other evidence reveals that Mr. Harmon or colleagues from his office met with or telephoned the Defendant no less than fourteen times to discuss his two ongoing criminal cases. The Defendant talked directly to Mr. Harmon, another attorney from the Public Defender's Office, and an investigator concerning the facts of the shooting and possible defenses. This defense team obtained and reviewed the state's ballistic reports and the Defendant's mental health records. The trial court concluded that Mr. Harmon's preparation was more than adequate, stating, "I don't see how in this case any additional meetings or longer meetings would have made any difference in regard to the case."

The Defendant argues in his brief that the Tennessee Supreme Court set forth a three-part "standard of preparation" in Baxter v. Rose, 523 S.W.2d at 930, of which the Defendant's trial counsel failed to meet the first part: "Counsel should confer with his client without delay and as often as necessary. . . ." Id. at 932-33. However, we do not see this partial quote from Baxter as the controlling standard.[2] Rather, the clear standard in Tennessee for ineffective assistance of counsel, including claims of inadequate preparation, is the two part deficiency and prejudice standard of Strickland, 466 U.S. at 687, and Burns, 6 S.W.3d at 461. Applying an objective standard of reasonableness we find no deficient representation based on the evidence presented. Moreover, we

[2]The three guidelines the Defendant quotes as a "standard of preparation for defense counsel" originate with the United States Court of Appeals for the District of Columbia Circuit opinion, United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1983). In this opinion, Judge Bazelon quoted the American Bar Association Standards for the Defense Function, and noted they were the "legal profession's own articulation of guidelines for the defense of criminals." Id. at 1203. The Tennessee Supreme Court also quoted the three guidelines in Baxter, but only as part of its background survey of eleven different federal circuits and their gradual shift away from the old "farce and mockery" rule as a gauge of ineffective counsel in the early 1970's and prior to Strickland.

agree with the trial court that the Defendant was in no way prejudiced by the number or length of the attorney-client meetings. Thus, we find the Defendant failed to prove by clear and convincing evidence that his trial attorney provided ineffective assistance of counsel due to inadequate trial preparation.

B. Persuasion of Defendant not to testify

The Defendant also argues that his trial counsel's failure to call him to testify on his own behalf amounted to ineffective representation. The Defendant maintains that only he could have presented his version of the events leading up to the "accidental" shooting which would contradict the testimony of his wife and her two co-workers. The Defendant maintains that had he been called, he could have testified to the "stormy relationship" he shared with his wife, and more significantly, he would have had the opportunity to refute the State's contention that he was able to form the necessary intent required to commit the alleged offenses.

The State noted that the Defendant testified before the trial judge that he made the decision not to testify. The State also presented testimony that Mr. Harmon never coerced his client not to testify, but rather advised him that doing so would likely do more harm than good considering the circumstances. The evidence reveals that had the Defendant testified, it would have opened the door to his impeachment through prior convictions of burglary and aggravated burglary. Furthermore, the Defendant's version of the event at the time of the trial did not match that of his statement given to the police the day of the shooting. Mr. Harmon testified that he was concerned about the Defendant's potentially damaging testimony concerning drug use, prior convictions, and his generally "obtuse" demeanor.

The trial court agreed with the State that Mr. Harmon's tactical decision to advise his client not to take the witness stand was based on sound judgment, stating:

> You know, that certainly gets down to credibility, but I think I can draw the conclusions, having tried these cases, that the jury would have almost out of hand rejected his credibility on that issue and I think it would have assisted the state in convicting him of the greater charges, not the lesser. . . .[H]ad he testified, I don't think he would have got the benefit that he got the first time around.

We agree with the trial court's conclusion that counsel's advice was sound. The Defendant relies on State v. Zimmerman, 823 S.W.2d 220, 227 (Tenn. Crim. App. 1991), which stated in part, "the failure of a defense attorney to call the defendant is often a key factor on the issue of ineffective assistance." However, the facts in Zimmerman are quite different from the case at hand. In Zimmerman, the defense counsel, among several other errors, planned a defense where the defendant would testify, informed the jury during opening statements that the defendant would testify, and then failed to follow through and actually call the defendant. This Court said, "[we] hold that the efforts of trial counsel were deficient, not necessarily with respect to preparation or investigation, but by the peremptory abandonment of the pre-established and reasonably sound defense strategy. . . ."

Zimmerman, 823 S.W.2d at 224. Here, the sound trial tactic of advising the Defendant not to take the stand was the defense strategy from the beginning, and it simply does not amount to deficient representation. While this argument is deemed meritless at this point, we further note that the Defendant has not demonstrated that his lawyer's advice prejudiced him.

C. Inadequate cross-examination of witnesses

The Defendant claims that his trial counsel provided ineffective representation through inadequate cross-examination of two key witnesses. The evidence shows that Mr. Harmon's cross-examination of the victim's surgeon, Dr. Richart, allowed the surgeon to repeat in graphic detail the horrific and gruesome wound the victim suffered as a result of the gunshot. The Defendant claims this testimony was highly damaging to his case and added nothing to the defense. Mr. Harmon testified that his purpose in asking about the gunshot wound was to establish that only one shot was fired, which would bolster the accidental shooting defense, considering that the Defendant entered the store with five shells but only one was discharged. Mr. Harmon did not anticipate that the surgeon would answer his question by reiterating all of the victim's injuries in such great detail.

The evidence also reveals that Mr. Harmon questioned Agent Royce, the ballistics expert called by the State, about the different pull weights for triggers on guns. The Defendant claims that due to Mr. Harmon's question, Agent Royce was able to testify that the gun used by the Defendant contained an action with a relatively heavy trigger pull weight, testimony which prejudiced the accidental discharge defense. This line of questioning also allowed Agent Royce to testify that hitting the butt of the gun accidentally would not make it discharge. Mr. Harmon stated that he read the entire ballistics report and no mention was made of the trigger pull weight on the gun. Mr. Harmon testified that he asked the question merely to establish that different guns have different trigger pull weights, and was surprised when Agent Royce declared that he had administered a trigger pull weight test on the gun used by the Defendant and classified it as heavy, i.e., requiring a significant amount of force to pull the trigger.

Mr. Harmon's questions illustrate the old adage that "hindsight is 20/20." However, as already stated above, this Court will not use the benefit of hindsight to second-guess trial strategy or criticize counsel's tactics. See Hellard, 629 S.W.2d at 4, 9. Moreover, counsel's alleged errors will be judged in the light of all the facts and circumstances at the time they were made. See Hicks, 983 S.W.2d at 246. As we are not allowed to second-guess tactics and strategy, we again find no deficiency in representation by the Defendant's trial counsel.

D. Failure to present evidence of Defendant's history of mental illness

During opening statements at the trial, the Defendant's counsel raised the issue of the Defendant's mental health problems. In closing arguments, the State reminded the jury that the defense had presented no evidence in support of the alleged mental illness. At the post-conviction hearing, the Defendant claimed that he repeatedly asked Mr. Harmon to inform the jury of his history of mental illness. He testified that he suffered from mental illness "since the middle '70s" and had a record of "suicide attempts, overdoses, and stuff like that." The evidence reveals that the Defendant had visited mental health professionals off and on since 1992. The Defendant's sister

testified that in the days leading up to the shooting the Defendant did not sleep and was depressed, but Mr. Harmon did not call on her to testify at the trial. The Defendant now claims that the failure of Mr. Harmon to present evidence of the Defendant's extensive mental health history, or at least his failure to "further investigat[e] whether these facts would help the Defendant at trial," amounted to deficient representation which prejudiced the Defendant.

At the post-conviction hearing the State presented evidence that the Defendant's medical records did not support a claim of mental illness that would have amounted to a defense to attempted murder. The State pointed out that the Defendant was monitored for 30 days in a mental health institute prior to trial and declared competent to stand trial. Mr. Harmon testified that he carefully reviewed the Defendant's medical records and made the tactical decision to not introduce them because every page that may have been helpful also contained other information that would have hurt the Defendant's defense. The evidence on record reveals that the Defendant's mental health problems had been diagnosed as primarily stemming from poly-substance abuse, anti-social behavior and "malingering" or faking mental illness. The evidence also reveals that the Defendant's mental health records would have revealed to the jury that the Defendant was a habitual drug user, his first diagnosis of mental illness in 1992 was attributed to malingering, his two suicide attempts were both while he was in jail for other crimes, he attacked his wife with a knife in 1998, he made threatening calls to his wife while in the mental institution, and just 10 days before the shooting he told his doctor that he wanted to hurt his wife.

The post-conviction court made the determination that introducing evidence of the Defendant's mental illness would have been more detrimental to his defense at trial than helpful. The court declared:

> he's complaining that his mental health was not called to the attention of the jury, because no doctors were called to provide that. Well, I think the record speaks for itself on that issue. I think the detriment, if you go back to this standard of whether or not the deficiency would prejudice the defense, certainly no prejudice by not doing that in this particular case. In fact, it probably benefits him that that proof was not offered.

The Defendant relies on a three-part guideline suggested by this Court in Wilcoxon v. State, 22 S. W. 3d 289 (Tenn. Crim. App. 1999), which states:

> Where counsel (1) makes some exploration of the mental history of the appellant but fails to take an obvious and easily available step which would have made such a defense viable, (2) does not produce reasonable tactical reason for not pursuing further investigation, and (3) raises no other plausible defense, courts may find ineffective assistance of counsel.

Id. at 315 (citing Smith v. State, No. 02C01-9801-CR-00018, 1998 WL 899362, at * 22, (Tenn. Crim. App., Nashville, Dec. 28, 1998)) (holding counsel's failure to raise issue of defendant's claim

of diminished capacity was not ineffective assistance of counsel). However, the Defendant has failed to prove by clear and convincing evidence that his trial counsel failed to meet any of the Wilcoxon requirements. First, the evidence on record shows that Mr. Harmon did investigate the mental history of the Defendant but reasonably concluded there was no obvious and easily available next step of presenting evidence which would be beneficial to the Defendant. Second, the tactical reason for not pursuing the mental deficiency defense was aptly summarized by the post-conviction judge when he stated the Defendant's "record speaks for itself." Indeed, the Defendant's mental health records reveal malingering, poly-substance abuse, anti-social behavior and previous threats and attacks on his wife--none of which would have been particularly helpful to his defense. Finally, the Defendant's trial counsel did present another plausible defense, an accidental shooting, and jury consideration of lesser offenses than those charged.

As noted above, we are required to indulge the strong presumption that the trial counsel's conduct falls within the wide range of reasonable professional conduct. We conclude that the Defendant has failed to demonstrate that trial counsel's failure to present additional evidence of the Defendant's mental history either rose to the level of deficient representation or prejudiced the Defendant.

E. Failure to object to flawed jury instructions.

The Defendant claims that he is entitled to post-conviction relief because his trial counsel failed to object to the trial court's flawed jury instructions regarding the definition of "knowingly" as it applied to the mens rea element of second degree murder. The Defendant correctly notes that this Court declared in State v. Page, 81 S.W.2d 781, 788 (Tenn. Crim. App. 2002), that second degree murder requires a mens rea of "knowing" based exclusively on the defendant's awareness of the result of his conduct, and not based on the nature of the conduct or the particular circumstances. It is the assertion of the Defendant that because the judge at his trial charged the jury with the "pattern" jury instructions on "knowingly," which included all three of the above-referenced elements as opposed to just result-of-conduct, the instructions were flawed and his trial counsel's failure to object to these instructions constitutes ineffective assistance of counsel. The Defendant concedes that the Page ruling came after his trial, but claims its holding could have been predicted by trial counsel from the then available lower court holdings of what would eventually become the Tennessee Supreme Court ruling of State v. Ducker, 27 S.W.3d 889 (Tenn. 2000). Alternatively, the Defendant claims his trial counsel should have simply recognized the flawed nature of the pattern jury instructions as plain error even without the benefit of Ducker and its progeny.

The State first argues that the Defendant has procedurally waived this issue because he failed to include the jury instructions in the record on appeal. Alternatively, the State maintains that the Defendant's claim fails because the Page rule pertaining to the proper jury instruction on "knowingly" in a second degree murder charge was first announced by this Court more than two years after the Defendant's trial and jury conviction. At the post-conviction hearing, the trial judge agreed with the State's position, noting that the Page opinion had not yet been filed at the time of the Defendant's trial, and that the Defendant failed to prove his trial counsel provided ineffective assistance of counsel by not predicting the Page holding. The judge concluded, "I don't think

counsel could have anticipated, if I'm correct, what the court of appeals was going to say on that issue."

When a party seeks appellate review he is charged with the "duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)); see also Tenn. R. App. P. 24(b).[3] It is well established that "an appellate court is precluded from considering an issue when the record does not contain a transcript or statement of what transpired in the trial court with respect to the issue." State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990); see also Ballard, 855 S.W.2d at 560-61. Although the transcript of the jury charge was not included in the record on appeal, we find the record on appeal is otherwise adequate to allow us to review the issue. The Defendant's trial counsel testified that he did not object to the "triple definition of knowing" at trial and the trial judge stated that he used the pattern jury instructions from the "charge book." Therefore, we will address this issue on the merits.

Our supreme court declared in State v. Ducker, 27 S.W.3d at 896, that child abuse offenses were nature-of-conduct offenses. In dicta, the court also noted that second degree murder was an example of a result-of-conduct offense, id., but never addressed the issue of how a jury should be instructed as to the "knowing" element or whether the pattern jury instructions defining "knowingly" would present problems in a jury charge on second degree murder. See Page, 81 S.W.3d at 787-88. The first opinion to find reversible error in the failure to charge second degree murder as strictly a result-of-conduct offense was the unreported case of State v. Dupree, No. W1999-01019-CCA-R3-CD, 201 WL 91794, at *4 (Tenn. Crim. App., Jackson, Jan 30, 2001). However, in Dupree the trial court charged only the two incorrect elements of "knowingly" while omitting entirely the result-of conduct element. Id. Not until Page, issued in April of 2002, did his Court bring clarity to the issue by declaring: "it is now established that a knowing second degree murder is strictly a result-of-conduct offense. A jury instruction that allows the jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the state's burden of proof." Page, 81 S.W.3d at 788 (citation omitted).

The Defendant now argues that his trial counsel's failure at trial in December of 1999 to predict the dicta in Ducker, our holding on Dupree, and the rule announced several years later in Page falls outside the wide range of reasonable professional assistance. We disagree. Indeed, this Court has previously held that a failure to anticipate the Page rule does not amount to ineffective assistance of counsel. In Winfield v. State, No. W2003-00889-CCA-R3-PC, 2003 WL 22922272 at *10 (Tenn. Crim. App., Jackson, Dec. 10, 2003), this Court determined that counsel had not been ineffective by failing to anticipate from the earlier decision of Ducker the later Page rule:

[3] If a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. . . .

> We begin our analysis of this question by noting the Page opinion was filed more than nine months after the Defendant's appeal was concluded. Ducker was decided after the trial of this case; thus, defense counsel could only raise this issue on appeal under the plain error doctrine. See Tenn. R. App. P. 52(b). While it is arguable appellate counsel could have anticipated our holding in Page based on Ducker and Dupree, we do not find his performance deficient for failing to do so. As we observed in Page, Ducker was not a second degree murder case and did not discuss jury charges. See Page, 81 S.W.3d at 788. Furthermore, the jury instruction in Dupree was distinguishable from the jury charge in both Page and the instant case.

Winfield at *10. Likewise, in Eady v. State, No. E2002-0311-CCA-R3-PC. 2004 WL 587639, at *8 (Tenn. Crim. App., Knoxville, March 25, 2004), this Court reversed and remanded for dismissal the order of the post-conviction court which granted the Defendant relief for his counsel's failure to raise as an issue on appeal that the jury was given improper instructions on "knowingly" as to murder in the second degree. In Eady, while the defendant's appeal was filed before Page, it was after Ducker. Nonetheless, we found that "the issue [of proper jury instruction for second degree murder] was not settled until the release of this court's opinion in Page." Eady, at *8.

In the case at hand, unlike in Winfield and Eady, the Defendant's trial counsel did not have the benefit of our supreme court's Ducker holding at the time of the trial. Therefore, our reasoning in Winfield and Eady is even more persuasive here. The Defendant has failed to convince us that at the time of his trial in December of 1999, any defense attorneys were doing what Defendant now claims his attorney was deficient for not doing, that is, predicting that the pattern jury instructions then routinely used to define "knowingly" were defective as to a second degree murder charge. Accordingly, we find that the Defendant's trial counsel did not provide ineffective assistance of counsel. This issue has no merit.

CONCLUSION

For the reasons stated above, we find that the Defendant has been unable to prove ineffective assistance of counsel by clear and convincing evidence. Therefore, we affirm the trial court's decision denying post-conviction relief.

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DAVID H. WELLES, JUDGE